MALAYSIAN INDIAN CONGRESS & ORS

v.

MAKKAL OSAI SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2(S6)-23-52-1999]
19 OCTOBER 2000

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Service of - Time limit - Whether 14-day period runs from date of service of sealed or unsealed copy of summons - Conflicting decisions of Court of Appeal - Rules of the High Court 1980, O. 32 r. 13(2)(b)*

The defendants served an unsealed copy of their application for further and better particulars ('encl 75') together with a supporting affidavit on the plaintiffs on 16 August 2000. The plaintiffs' affidavit in reply ('encl 79') was served on the defendants on 7 September 2000. The defendants therefore took the preliminary objection, based on O. 32 r. 13(2)(b) Rules of the High Court 1980 ('RHC'), that encl 79 ought to be rejected as it had to be but was not served on or before 30 August 2000, relying on *Structural Concrete Sdn Bhd & Ors v. Wing Teik Holdings Bhd* [1997] 1 CLJ 300 CA. The plaintiffs, conversely, submitted that the 14-day period prescribed by O. 32 r. 13(2)(b) RHC ran from the date of service of the sealed copy of the summons and not from the date of service of the unsealed copy of the summons, relying on *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 CA.

Held:

[1] The decision in *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* was reasonable; until the summons was sealed, the affidavit in support had no legal effect and therefore did not create any obligation on the party served with it to reply it.

[Defendants' preliminary objection dismissed.]

Case(s) referred to:
Kuala Lumpur Securities Sdn Bhd v. Lee Chooi Mee (Civil Suit No 22-229-96) ***(foll)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(foll)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(not foll)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(1), O. 32 rr. 2(1), 13(2)(b)

For the plaintiffs - S Nanthabalan (Sujatabalan with him); M/s Shook Lin & Bok
For the defendants - Saraswathy Kandasami; M/s S Kandasami & Co

Reported by Gan Peng Chiang

JUDGMENT

RK Nathan J:

Facts

The plaintiffs sued the defendants for libel. For the purposes of deciding the present issue before me I do not have to state the full facts. The defendants sought, by way of encl. 75, further and better particulars of certain paragraphs of the plaintiffs' reply, to their defence. In the course of filing their respective affidavits for and against the said application, the defendants took a preliminary objection in respect of an affidavit filed by the plaintiffs in reply, contending that the said encl. 79 was filed contrary to O. 32 r. 13(2)(b) of the Rules of the High Court 1980 (the RHC).

Findings Of The Court

The defendants had on 16 August 2000 served an unsealed copy of the application (encl. 75) together with the supporting affidavit on the plaintiffs. Relying on *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300 Cik Saraswathy for the defendants argued that the affidavit in reply (encl. 79) ought to have been served on her on or before 30 August 2000. Since it was only served on 7 September 2000 she argued that the said affidavit ought to be rejected.

Mr. Nanthabalan for the plaintiffs relied on *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 which is another decision of another panel of the Court of Appeal which held that the 14-day period would run not from the date of service of the unsealed copy of the summons, but from the date of the service of the sealed copy of the summons. Faced with these two conflicting decisions of the Court of Appeal the parties moved this court to decide on this issue before they would proceed on the substantial application.

It is most unfortunate that in *Structural Concrete* the court was only referred to the earlier High Court decision in *Pua Lai Ong* and not to the decision of the Court of Appeal. In *Structural Concrete* the court pointed out that the lower court had based its decision relying on O. 32 r. 2(1) of the RHC in

that the issue of a summons by which an application in chambers is to be made takes place on its being sealed by an officer of the registry. What this means is that until the summons is sealed, there is in actual fact no application pending. There was another factor for the consideration of the Court of Appeal in *Structural Concrete*. It considered the fact that the High Court judge had also held that, "the delay" of one day did not make much of a difference as the curative provision of O. 2 r. 1(1) of the RHC could be invoked. There was an excess of a day in that the affidavit was filed one day after the 14-day period. Having pointed out these two factors the Court of Appeal in *Structural Concrete* said at p. 586 as follows:

> However, we would like to add that the critical words in O. 32 r. 13(2) – for the purposes of computation of time – are 'within 14 days from the date of the filing of the application' and in O. 32 r. 13(2)(b) within 14 days from the date of service.
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> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. Consequently, we are unable to agree with the part of the judgment of the learned Judge in the court below and in the case of *Pua Lai Ong* earlier referred to.

The Court of Appeal in *Structural Concrete* was also of the view that the object of the exercise of serving the other party the unsealed copy was to give early notice. Now, considering the decision of the Court of Appeal in *Pua Lai Ong*, it seems clear that the rationale for its decision was premised on the fact that until the summons was sealed, the affidavit in support **had no legal effect** (emphasis provided) and therefore it did not "create any obligation on the part of the party served with such an affidavit, to reply to it". This to my mind is reasonable. The party served with an unsealed copy of the application and the supporting affidavit will not know when the application was actually sealed, until such sealed copy is served on him. For all intents and purposes, service of an unsealed copy would put the party served, on notice to start gathering his materials and to be ready to file the affidavit in reply within time when served. That is all. Faced with the dilemma of having two conflicting decisions of the Court of Appeal I take comfort in the decision of my learned brother, Low Hop Bing J, who in a recent judgment dated 12 May 2000 in Shah Alam High Court Civil Suit No. 22-229-96 in *Kuala Lumpur Securities Sdn Bhd v. Lee Chooi Mee*, faced with a similar situation, elected to rely on the decision of the Court of Appeal in *Pua Lai Ong.* I take the same course.

In the case before me, Cik Saraswathy argued that when the matter was before me I had already fixed the hearing date for the said application, even before the summons was sealed. That may be so. But O. 32 r. 2(1) clearly stipulates that the issue of the summons only takes place when it is sealed. As is my

practice, I have case management dates and no doubt I had fixed the application for hearing on the next case management date, but that cannot be seen to give the defendants a right to rely on the service of an unsealed copy of the application as sufficient service in respect of O. 32 r. 13(2)(b) of the RHC. The preliminary objection is therefore dismissed. In fairness to the parties, costs will be costs in the cause.